Jack Cooper Holdings Corp. d/b/a Jack Cooper Transport Company, Inc. *and* International Brotherhood of Teamsters, General Drivers, Warehousemen & Helpers Local Union No. 89 (IBT)

Jack Cooper Holdings Corp.; Jack Cooper Specialized Transport, Inc.; & Jack Cooper Transport Company, Inc. *and* International Brotherhood of Teamsters, General Drivers, Warehousemen & Helpers Local Union No. 89 (IBT)

Jack Cooper Transport Company, Inc. *and* International Brotherhood of Teamsters, General Drivers, Warehousemen & Helpers Local Union No. 89 (IBT). Cases 09–CA–150482, 09–CA–100184, and 09–CA–101258

December 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On January 27, 2016, Administrative Law Judge Melissa Olivero issued the attached decision[1] in Case 09–CA–150482, finding that Respondent Jack Cooper Holdings Corp. d/b/a Jack Cooper Transport Co. engaged in certain unfair labor practices. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. Charging Party International Brotherhood of Teamsters, General Drivers, Warehousemen & Helpers Local Union No. 89 (IBT) also filed an answering brief.

On March 11, 2016, the General Counsel filed a Motion for Default Judgment and a memorandum in support in Cases 09–CA–100184 and 09–CA–101258. On that same date, the General Counsel also moved to consolidate the Motion for Default Judgment with Case 09–CA–150482. The allegations in Cases 09–CA–100184 and 09–CA–101258 had initially been resolved when the parties entered into an informal settlement agreement, which was approved by the Regional Director for Region 9 on August 19, 2013. After issuance of the judge's decision in Case 09–CA–150482, the Regional Director set aside the settlement agreement and issued a consolidated complaint reviving the allegations in the two prior cases, and the General Counsel filed the instant Motion for Default Judgment on the grounds that the conduct alleged in Case 09–CA–150482 violated the terms of the settlement agreement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We grant the General Counsel's Motion to Consolidate. As explained below, we adopt the judge's findings in Case 09–CA–150482, and we find that the violations in that case warrant default judgment in Cases 09–CA–100184 and 09–CA–101258 against Respondents Jack Cooper Holdings Corp. and Jack Cooper Transport Co. (collectively "Respondent").[2]

I. THE ALLEGED POSTSETTLEMENT UNFAIR LABOR PRACTICES: CASE 09–CA–150482

We have considered the judge's decision and the record in Case 09–CA–150482 in light of the exceptions and briefs and have decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

As more fully explained in the judge's decision, this case arises out of requests for information made by the Union on February 11, 2015, and March 3, 2015 (and amended on March 26, 2015). The requests sought information related to a grievance filed by the Union on February 11, 2015, which asserted that the Respondent had diverted work away from the bargaining unit, in violation of the National Master Automobile Transporters Agreement (NMATA) and the Jack Cooper Work Preservation Agreement (WPA).[5] As of the time of the hearing, the Respondent had not provided any of the information the Union requested.[6]

[1] We correct the judge's citation to *The Finley Hospital*, which is reported at 362 NLRB No. 102 (2015), and observe that the decision was enforced in relevant part by the Eighth Circuit at 827 F.3d 220 (2016).

[2] The Respondent does not except to the judge's finding that Jack Cooper Transport is a controlled subsidiary of Jack Cooper Holdings. Both companies were named as respondents in the 2013 case, but they are named as a single company in the 2015 case (i.e., Jack Cooper Holdings Corp d/b/a Jack Cooper Transport Company). Accordingly we will refer to the Respondent in the singular except in the findings of fact below, which are based on the 2013 complaint allegations.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[4] We will modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We will also substitute a new notice to conform to the Order as modified.

[5] The Respondent is signatory to the NMATA, which was negotiated between the Teamsters National Automobile Transporters Industry Negotiating Committee and signatory employers. The NMATA includes work preservation provisions that contractually limit signatory employers from diverting work to nonunion carriers. The Respondent is also a signatory to the Jack Cooper WPA, which prohibits Respondent from subcontracting, transferring, or leasing unit work.

[6] In communications on March 13 and 18, the Respondent disputed the relevance of the information requested and demanded that the Un-

Section 4 of Article 33 of the NMATA, provides:

> In the event that a Work Preservation Grievance is submitted, the Employer or Union may request, in writing, specific relevant information, documents or materials pertaining to such grievance and the other party shall respond to such request within fifteen (15) days of the receipt of such request.

The NMATA further states that, in the event that one party fails to comply with a request for information, the other party may request a subpoena duces tecum from the majority of the Board of Arbitration requiring that the information be produced. In the event of noncompliance with the subpoena, the NMATA allows the party requesting information to seek enforcement in federal court pursuant to Section 301 of the Labor-Management Relations Act (LMRA).[7]

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the requested information. In doing so, she rejected the Respondent's argument that the matter should be deferred to arbitration. As explained more fully below, we decline to defer this case to arbitration. Instead, we adhere to the Board's longstanding policy of nondeferral in information request cases. See *Shaw's Supermarkets, Inc.*, 339 NLRB 871, 871 (2003) (citing *General Dynamics Corp.*, 270 NLRB 829, 829, 834–836 (1984)). On the merits, we agree with the judge that the Respondent violated Section 8(a)(5) and (1).

1. The Board's Policy of Nondeferral in Information Request Cases

An employer's statutory duty to bargain collectively and in good faith encompasses the duty to furnish, on request, information relevant to and necessary for its employees' exclusive representative to perform its representational functions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 151–153 (1956). Pursuant to Section 8(a)(5) and (1) of the Act, the Board has the authority to find an unfair labor practice when an employer refuses to provide such information.[8] In determining whether requested information is relevant, the Board employs a broad, discovery-type standard, requiring only that the requesting party show "the probability that the desired information is relevant and it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme*, supra at 437. Relevant information includes (but is not limited to) information related to actual or potential grievances.

Congress created the Board as the sole entity charged with administering the Act and preventing unfair labor practices. Section 10(a) of the Act states:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice [listed in section 8] affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise*....

29 U.S.C. §160(a) (emphasis added). Thus, Congress empowered the Board to protect employees' statutory rights and enforce statutory obligations—including the obligation to provide information—even if other entities might also be authorized to do so in other proceedings. See *Babcock & Wilcox Construction. Co., Inc.,* 361 NLRB 1127, 1130 (2014).

Moreover, while the Board has long recognized the policy favoring voluntary settlement of labor disputes through arbitral processes, the Board has weighed this policy against the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices. *Collyer Insulated Wire,* 192 NLRB 837, 840–843 (1971). Similarly, while the Su-

ion enter into a confidentiality agreement before the Respondent would provide information. Although the Union indicated its willingness to enter into a confidentiality agreement, the Respondent never provided one. The Union subsequently renewed its requests for information on March 26, clarifying earlier requests. By letter dated April 10, the Respondent continued its refusal to provide the information.

[7] The parties' Work Preservation Agreement contains a parallel section:

> In the event Union submits a grievance involving [Respondent] under the expedited arbitration procedure established in Article 33, Section 3 [of the NMATA] [Respondent] and Union shall provide all information, documents, or materials that are relevant in any way to the Union's grievance within fifteen (15) days of the receipt of any written request for such information, documents or materials by the Union or [Respondent]. If, and to the extent that, [Respondent] or the Union fails or refuses to comply with this request for information, for any reason, the [Respondent] or the Union may request a subpoena duces tecum from the majority of the Board of Arbitration requiring that the information be produced by the [Respondent] or the Union or any other entity or person. If, and to the extent that the subpoenaed party fails or refuses to comply with a subpoena issued by the majority of the Board of Arbitration, the Union or the [Respondent] may seek enforcement of the subpoena in federal court pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended. If, and to the extent [Respondent] or Union fails to comply with this provision for any reason, the Union [or Respondent] may argue that the Board of Arbitration should draw an adverse inference against [Respondent] or Union concerning the subject matter of the information that [Respondent] or Union has failed to provide to Union or [Respondent] within fifteen (15) days.

[8] Sec. 8(a)(5) of the Act, in relevant part, makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ."

preme Court, in its *Steelworkers* trilogy,[9] noted the importance of deferral to arbitration of labor disputes under collective-bargaining agreements (where contract interpretation is at issue), the Court has also recognized that the *Steelworkers* trilogy did not address whether the Board should defer information request cases to arbitration. *NLRB v. Acme*, 385 U.S. at 436. Thus, the Court in *Acme* elaborated:

> For those cases [*Steelworker*s trilogy] dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. . . . The relationship of the Board to the arbitration process is of a quite different order. . . . Moreover, in assessing the Board's power to deal with unfair labor practices, provisions of the Labor Act which do not apply to the power of the courts under [Section] 301, must be considered.

Id. at 436 (citations and footnotes omitted). The Court in *Acme* carefully distinguished prearbitral Board review of information request cases from arbitral and court review of the merits of a grievance, explaining that where the Board orders an employer to furnish information to the union, it is "not making a binding construction of the labor contract." Id. at 437. Accordingly, the Court found that the policies underlying the *Steelworkers* trilogy did not require the Board to defer information request cases to arbitration.

In sum, whether to defer to arbitration is a matter within the Board's discretion, see id., and the Board has long adhered to a policy of refusing to defer information-request allegations.[10] As the Court pointed out in *NLRB v. Acme*, supra at 438,

> Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened.

See also *Shaw's Supermarkets*, 339 NLRB at 871, where the Board explained that its policy of nondeferral in information request cases "aids the functioning of the arbitration process, by allowing evaluation of the merits of the claim before placing the effort and expense of arbitration on the parties, thereby narrowing the issues." The Board further noted that nondeferral eliminates the risk that the Board may ultimately need to consider the issue in any event (i.e., if the arbitrator declines to decide the issue). Id. at 871. Applying that policy here, we agree with the judge's refusal to defer this case to arbitration.

2. Application of Section 8(a)(5)

The Union sought information related to a grievance asserting that the Respondent had employed unauthorized nonunit personnel to perform work covered by the contract, thereby diverting work away from the bargaining unit, in violation of the NMATA and WPA. While this information was not presumptively relevant (as it concerned employees outside of the bargaining unit), we agree with the judge that the Union showed that the requested information was relevant and necessary to the Union's duty to investigate its members' claims that the Respondent was violating the terms of the NMATA and WPA and to determine the nature, scope, and extent of those alleged violations.[11] See *United States Postal Service*, 364 NLRB No. 27, slip op. at 1 (2016) (requested information was relevant in order for the union to determine whether it had a right to request bargaining over outsourcing initiative); *Schrock Cabinet Co.,* 339 NLRB 182, 182 fn. 6 (2003) (union established relevance of its request for information regarding subcontracting of specified work to prepare for grievance processing).

[9] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960).

[10] See also *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 447 (D.C. Cir. 2002) (noting that the Board's policy of nondeferral in information cases is "squarely within the purview of the Board").

[11] The Respondent argues that there is no responsive information to the Union's requests for information items 11, 12 and 13. Although the Respondent is not required to produce information that does not exist, the nonexistence of requested information does not excuse an employer (or union) from its duty to timely respond to the request, by disclosing that the information does not exist. See *Graymont PA, Inc.*, 364 NLRB No. 37, slip op. at 7 (2016) (quoting *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014)) (duty to bargain includes the duty "to timely disclose that requested information does not exist."). Accordingly, we reject the Respondent's defense based on the asserted nonexistence of the information sought in items 11, 12, and 13 of the Union's request.

The Respondent also argues that it should be excused from disclosing item 19 of the Union's request (relating to trips leased out of the Manheim, New Jersey facility) because it concerned confidential or proprietary information. The judge found that the Respondent asserted that claim in its March-April 2015 responses to the request, but that it offered no evidence at the hearing in support of its confidentiality claim. The judge also found that although the Union offered to sign a confidentiality agreement in March 2015, the Respondent made only an untimely, courthouse-steps offer to bargain with the Union over an accommodation. In view of the Respondent's failure of proof and failure to comply with its duty to seek an accommodation, we adopt the judge's order that the Respondent furnish the information.

3. Response to dissent

After careful consideration, we are not persuaded by our dissenting colleague's argument that the Board should reconsider its well-established nondeferral policy.

First, although the NMATA and WPA provide an avenue for resolution of information request disputes, their provisions lack the breadth of the statutory obligation under Section 8(a)(5). An information request under the Act need not be related to a pending grievance; rather, it is sufficient that a union requesting information is investigating whether or not to file a grievance. By contrast, in order to invoke an Article 33 claim under the NMATA, a grievance must first be filed. The Respondent is then required to provide any information *relevant to the Union's grievance*. Although the Union did concurrently file a grievance in this case, the information sought may be relevant to expanding its grievance beyond its stated terms, based on information that only becomes available in response to the information request. The Board's Section 8(a)(5) standard does not limit the Union to obtaining information "relevant to the grievance," but instead permits the Union to obtain information that it is potentially relevant and would be of use to the Union in carrying out its statutory duties. *NLRB v. Acme*, supra at 438. Thus, under the Board's Section 8(a)(5) standard, the Union is entitled to information that is relevant to potential future grievances as well as information relevant to the filed grievance. See e.g., *Chapin Hill at Red Bank*, 360 NLRB 116 (2014). This disparity in the standards of relevance underscores the limited ability of an arbitrator to review information request cases in which the information is sought to evaluate potential, rather than existing, grievances.

Second, our dissenting colleague argues that review by the Board would decrease efficiency by creating a multi-forum review system—i.e. Board review of the information request disputes and later arbitrator review of the grievance itself. Deferring the information request issue would not eliminate the two-forum review process, however. Under the agreement, if the Respondent initially refuses to provide relevant information, as it did here, the Union must seek a subpoena. The subpoena can be issued only by a majority of the Board of Arbitration. If the Respondent still refuses to provide the information, the Union's only recourse is to file a federal lawsuit. Thus, the information request case would be resolved by a federal court and the merits portion of the case would remain with the arbitrator. Given that the Respondent has refused to provide similar information previously, and has disputed the relevancy of the information here, we see no reason to assume that deferral would eliminate the two-tiered process or expedite this case.[12]

Moreover, as noted above, early Board review can increase efficiency by sifting through and culling out the issues for speedier resolution by the arbitrator. See *General Dynamics, Corp*., 268 NLRB 1432, 1432 fn. 2 (1984) (rejecting a two-tiered approach of deferral of information request issues to arbitrator before the substantive dispute, noting "[s]uch a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration") (citing *Safeway Stores*, 236 NLRB 1126 fn. 1 (1978); *St. Joseph's Hospital*, 233 NLRB 1116 fn. 1 (1977)). See also *Shaw's Supermarkets*, 339 NLRB at 871 (2003) ("the policy of nondeferral in information request cases actually aids the functioning of the arbitration process, by allowing evaluation of the merits of the claim before placing the effort and expense of arbitration on the parties").[13]

In addition, we disagree with our dissenting colleague's view that a case-by-case approach would expedite the processing of deferral cases. Instead, we believe his approach would likely result in delay as it introduces an additional issue for resolution in information request cases. For example, if the parties do not agree that deferral is appropriate, our colleague's approach would require the regional director to evaluate "the circumstances of a particular case," applying the multi-factor standard found in *Collyer Insulated Wire*, 192 NLRB 837 (1971). If the regional director declines to defer under *Collyer* and issues a complaint, delay would result if, after review, the administrative law judge and the Board deter-

[12] On August 19, 2013, the parties entered into an informal settlement agreement, settling 8(a)(5) and (1) charges filed against the Respondent. Pursuant to the terms of the settlement agreement, the Respondent agreed, among other things, to refrain from (1) unreasonably delaying in providing the Union with information that is relevant and necessary to its role as bargaining representative; (2) refusing to provide the Union with information that is relevant and necessary to its role as bargaining representative; and (3) in any like or related manner, interfering with, restraining, or coerce employees in the exercise of their Sec. 7 rights. As discussed below, the Respondent's failure to provide information in the instant case is grounds for setting aside the 2013 settlement agreement.

[13] We do not agree with our dissenting colleague's view that the Board's handling of information request cases "has likely impeded the expeditious resolution of the parties' contractual dispute." Contrary to his unsupported assertion that "unfair labor practice cases often take three to five years to be resolved," the Board's statistics show that in fiscal year 2016, 82.7 percent of all meritorious unfair labor practice cases were resolved and closed within 365 days from filing of the unfair labor practice charge, and 70.8 percent were resolved and closed within 120 days from filing.

As for the dissent's reference to the length of time this matter has been pending before the Board, we note this is a case where there is a divided panel with a lengthy dissent.

mine that the issue should have been deferred. Conversely, if the regional director does defer the case to arbitration, additional delay would result if the regional director determines after arbitration that deferral to the award is not warranted and that the complaint should issue. See *Babcock & Wilcox Construction Co*., 361 NLRB 1127 (2014) (setting forth the Board's post-arbitral review standards). Moreover in this case, the result of the case-by-case approach for which our colleague advocates is to send the case back to the administrative law judge to "perform the requisite analysis," including "reopening the record if necessary," which would delay resolution even longer.

We further disagree with the dissent's view that an arbitrator is in a better position than the Board to determine what information the requesting party needs. At the early stages of investigating a grievance, the information sought is often of a broader nature than the issue that ultimately gets submitted to an arbitrator. In evaluating the extent of the alleged violations, the Union likely has not conclusively determined the scope of the issue that it ultimately submits for arbitration.

As to the dissent's argument that the Board's involvement in this information case undermines the parties' contractual provisions for addressing information for work preservation grievances, we note that the Respondent itself has declined to follow this contractual procedure and has sought Board resolution of information requests it made to the Union pertaining to a work preservation grievance.[14] Thus, the parties clearly did not intend that the contractual provision was the exclusive means for addressing information matters. Further, the Board has found that even where a collective-bargaining agreement provides for resolution of information disputes through arbitration, it will not defer. See *Chapin Hill at Red Bank*, 360 NLRB at 116 fn. 2 (refusing to defer information request despite contractual provision concerning information requests); *SBC California*, 344 NLRB 243, 245 (2005) (refusing to defer information request despite explicit contractual provision, noting "nothing in the instant facts to suggest a basis for ignoring the Board's policy").

In sum, we find ample reason to adhere to our policy of non-deferral in information request cases. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with the information it requested.

[14] See *General Drivers, Warehousemen & Helpers Local Union No. 89*, 09–CB–157269, 365 NLRB No. 115 (2017), where the Respondent filed an unfair labor practice charge alleging that the Union failed to provide information relating to a work dispute grievance under the same provision of the same collective-bargaining agreement.

II. THE GENERAL COUNSEL'S MOTION FOR DEFAULT JUDGMENT: CASES 09-CA-100184 AND 09-CA-101258

Having found that the Respondent committed certain post-settlement violations, we turn to the General Counsel's Motion for Default Judgment. Upon charges filed on March 11 and 31, 2013, the Union and the Respondent entered into an informal settlement agreement, which was approved by the Regional Director for Region 9 on August 19, 2013.[15] Pursuant to the terms of the settlement agreement, the Respondent agreed, among other things, to refrain from (1) unreasonably delaying in providing the Union with information that is relevant and necessary to its role as bargaining representative; (2) refusing to provide the Union with information that is relevant and necessary to its role as bargaining representative; and (3) in any like or related manner, interfering with, restraining, or coerce employees in the exercise of their Section 7 rights.

The settlement agreement also contained the following noncompliance provision:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the complaint previously issued on June 11, 2013 in the instant case(s). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that the allegations of the aforementioned complaint will be deemed admitted and its Answer to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. . .

On April 20, 2015, the Union filed a charge against the Respondent in Case 09–CA–150482, alleging that Respondent Jack Cooper Holdings d/b/a Jack Cooper Transport and Jack Cooper Logistics had been engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, as described above in Section I. On October 23, 2015, the Regional Director notified the Respondent by letter that, by engaging in the conduct al-

[15] The Union also filed unfair labor practice charges on February 14, 2013 (01–CA–098369) and March 26, 2013 (09–CA–101267), but these charges were later withdrawn or partially dismissed by the Regional Director on May 31, 2013. On June 11, 2013, the Regional Director issued an order consolidating the remaining charges (Cases 09–CA–100184 and 09–CA–101258) and those charges were the subject of the informal settlement agreement.

leged in Case 09–CA–150482, the Respondent was in noncompliance with the settlement agreement. The letter urged the Respondent to remedy its noncompliance by providing a proposed second settlement agreement. The letter further advised the Respondent that, in the event the Respondent did not remedy its noncompliance, the Regional Director would reissue the consolidated complaint in Cases 09–CA–100184 and 09–CA–101258 and commence default judgment proceedings with the Board. The Respondent did not reply.

On February 7, 2016, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing against Jack Cooper Holdings Corp., Jack Cooper Specialized Transport, Inc., and Jack Cooper Transport Company, Inc. in Cases 09–CA–100184 and 09–CA–101258. On March 9, 2016, the General Counsel filed a motion for default judgment and supporting memorandum in Cases 09–CA–100184 and 09–CA–101258 and a motion to consolidate the default judgment motion with Case 09–CA–150482. On March 11, 2016, the Board issued an Order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed a response opposing the General Counsel's motion, and the Charging Party filed a statement in support of the General Counsel's motion.

Ruling on Motion for Default Judgment

A settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if "there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed." *Nations Rent, Inc.*, 339 NLRB 830, 831 (2003) (quoting *Twin City Concrete*, *Inc.,* 317 NLRB 1313, 1313 (1995) (internal cites omitted)). "[T]he issue of whether to give effect to or rescind a settlement agreement 'cannot be determined by a mechanical application of rigid a priori rules but must be determined by the exercise of sound judgment based upon all the circumstances of each case.'" Id. (quoting *Ohio Calcium Co*., 34 NLRB 917, 935 (1941), enfd. in part 133 F.2d 721 (6th Cir. 1943)).

In its response to the Notice to Show Cause, the Respondent makes the following arguments: (1) the Regional Director improperly withdrew approval of the August 19, 2013 informal settlement agreement, as the cases were closed on compliance by the Regional Director on November 13, 2013; (2) the consolidated complaint is time-barred under Section 10(b) of the Act; (3) the Regional Director's delay in seeking default judgment and consolidation is an abuse of authority that contravenes the purposes of the Act; and (4) default judgment is improper because the settled 2013 cases named a different entity than the 2015 complaint allegations. We reject these arguments for the following reasons.

The Respondent asserts that the prior settled cases were closed after full compliance with the terms of the settlement. Although the Respondent complied with the affirmative provisions of the settlement and the cases were closed, the obligation to refrain from violating the Act in any "like or related manner" was an ongoing obligation. It is undisputed that the violations found in Case 09–CA–150482 are the same types of violations alleged in and settled by the 2013 informal settlement.[16] Thus, we find that the Respondent's refusal to provide the requested information in Case 09–CA–150482 was a violation of the earlier settlement agreement's prohibition against violating the Act in any "like or related manner." See *ConAgra Foods, Inc.,* 361 NLRB 944, 948 (2014) (finding unlawful conduct "like or related to" conduct specifically prohibited under the settlement agreement supports finding of default judgment), enfd. in part 813 F.3d 1079 (8th Cir. 2016) (partially reversing Board as to underlying violation, but not as to broader holding that such a violation supports default judgment).

Likewise, we find no merit in the Respondent's assertions that the allegations are time-barred by Section 10(b) of the Act because the Regional Director reinstated the charge more than 6 months after the case was closed on compliance pursuant to the settlement. The Regional Director has authority to revoke a settlement agreement beyond the 10(b) period, particularly where, as here, the subsequent alleged unfair labor practices are contrary to the remedial provisions of the prior settlement agreement. See *YMCA of the Pikes Peak Region, Inc., v. NLRB*, 914 F.2d 1442, 1453 fn. 11 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991) (citing *Hotel & Restaurant Employees Local 19,* 281 NLRB 524 (1986), enfd. 826 F.2d 1070 (9th Cir. 1987)) (where settled charge was timely filed, Section 10(b) does not prevent the General Counsel from litigating matters encompassed in a settlement agreement that was set aside beyond the 10(b) period). Otherwise, there would be little to prevent a party from breaching a settlement agreement with impunity once the 6-month period had expired. Id.

In addition, we reject the Respondent's assertion that the Regional Director improperly delayed seeking default judgment and consolidation. The Regional Director acted in a timely manner after the settlement agreement was breached.

[16] Indeed, the Respondent was on notice of the potential relevance of such information, as both requests stem from the same allegation as had been made in the prior 2013 case—i.e. that the Respondent violated Article 33 of the NMATA and the WPA.

Finally, the Respondent asserts that default judgment is improper because the 2013 case involved information requests regarding Jack Cooper Specialized Transport, Inc., a subsidiary of Jack Cooper Holdings Corp. that is not named in the 2015 case. The Respondent asserts that Jack Cooper Specialized was dissolved "on or about February 2014." Because there are no allegations in the 2015 case that Jack Cooper Specialized violated the Act (and therefore no basis to find that it defaulted on the 2013 settlement), we will grant the General Counsel's motion for default judgment against Jack Cooper Holdings Corp. and Jack Cooper Transport Company, but not against Jack Cooper Specialized.

In sum, we find that the violation in Case 09–CA–150482 for failing to provide information requested by the Union is "like or related" to the allegations at issue in the 2013 settlement. By entering into the 2013 settlement agreement, the Respondent assumed a continuing obligation to refrain from refusing to provide relevant information. But by the actions described above, the Respondent violated that agreement. Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent Jack Cooper Holdings Corp. (Holdings) has been a corporation with an office and place of business in Kansas City, Missouri, and has been engaged in the business of interstate transportation of freight. In conducting its business operations during the 12-month period ending January 31, 2016, Respondent Holdings derived gross revenues in excess of $50,000 for the transportation of freight in interstate commerce under arrangements with and as an agent for various common carriers which operate between various states. Based on its operations described above, Respondent Holdings functions as an essential link in the transportation of freight in interstate commerce.

At all material times the Respondent Jack Cooper Transport Company (Transport) has been a corporation with an office and place of business in Louisville, Kentucky and has been engaged in the interstate transportation of freight. In conducting its operations during the 12-month period ending January 31, 2016, Respondent Transport performed services valued in excess of $50,000 in states other than the Commonwealth of Kentucky.

At all material times, the Union, International Brotherhood of Teamsters, Local Union No. 89, has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times, the National Automobile Transporters Labor Division (the Association) has been an organization composed of various employers in the automobile transporting industry, one purpose of which is to represent its employer members in negotiating and administering collective-bargaining agreements with the International Brotherhood of Teamsters and its Local Union affiliates, including the Union.

At all material times, Respondent Holdings and Respondent Transport have been employer-members of the Association and have authorized the Association to represent them in negotiations and administering collective-bargaining agreements with the Union.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent Holdings within the meaning of Section 2(11) of the Act and agents of Respondent Holdings within the meaning of Section 2(13) of the Act:

Robert Griffin—Chief Executive Officer
T. Michael Riggs—Chairman
Curtis Goodwin—Respondent Transport Senior Vice President Labor Relations

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent Transport within the meaning of Section 2(11) of the Act and agents of Respondent Transport within the meaning of Section 2(13) of the Act:

Craig Irwin—President
Curtis Goodwin—Senior Vice President Labor Relations

The following employees of the Respondents (the Unit) constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> All truckaway, driveaway, local and other classifications of employment employed by members of the Association and of the employers who have authorized the Association to bargain on their behalf, including Respondents, but excluding supervisory, managerial, guard, and confidential employees.

Since about June 1, 2011, and at all material times, the Union, International Brotherhood of Teamsters, and its various other local union affiliates have jointly been the exclusive collective-bargaining representative of the Unit. This recognition had been embodied in a collective–bargaining agreement (The National Master Automobile Transporters Agreement), which is effective from June 1, 2011 to August 31, 2015 (the Agreement). At all material times since June 1, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

The Respondents have engaged in the following conduct

1. (a) Since about February 20, 2013, the Union has requested, in writing, information relevant to the Union's performance of its duties as the exclusive collective-bargaining Representative of the Unit, including:

> (1) The names of employees/owner operators of Jack Cooper Specialized Transport Inc.;
>
> (2) The names of drivers who pulled trips for Jack Cooper Specialized Transport, Inc. since December 21, 2012;
>
> (3) A copy of all executed Health, Welfare and Pension benefit fund participation agreements under the NMATA to which Jack Cooper Specialized is a party;
>
> (4) Current wage rates and benefit packages for IBT members employed by Jack Cooper Specialized Transport.

(b) The information requested by the Union, as described above in paragraph 1(a), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about March 7, 2013, Respondent Holdings, by Curtis Goodwin, in writing, has failed and refused to furnish the Union with the information requested by it as described above in paragraph 1(a).

2. (a) Since about February 25, 2013, the Union has requested, in writing, that Respondent Transport furnish the Union with the following information:

> A list of all loads given by Jack Cooper Transport Company to Jack Cooper Specialized drivers since September 8, 2012 until present –broken down by driver, terminal dispatched from, and destination.

(b) From about February 25, 2013 to about April 16, 2013, Respondent Transport unreasonably delayed in furnishing the Union with the information requested by it as described above in paragraph 2(a).

3. (a) Since about February 28, 2013, the Union has requested in writing that Respondent Jack Cooper Transport furnish the Union with the following information:

> (1) The used cars/auction cars/secondary market cars/and/or rental cars that Jack Cooper Transport hauled prior to June 1, 2008.
>
> (2) The used car/auction car/secondary market car/and/or rental car traffic not covered by an Article 2 Section 8 agreement that Jack Cooper Transport has hauled (now or in the past).

(b) The information requested by the Union, as described above in paragraph 3(a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about March 19, 2013, Respondent Transport, by Curtis Goodwin, in writing, has failed and refused to furnish the Union with the information requested by it as described in paragraph 3(a).

CONSOLIDATED CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact and the entire record in this consolidated case, we amend the administrative law judge's conclusions of law consistent with our findings herein, as follows.

1. The Respondent Jack Cooper Holdings d/b/a Jack Cooper Transport Co., Inc. violated the terms of the settlement agreement entered into in disposition of Cases 09–CA–100184 and 09–CA–101258, by failing and refusing to provide the Union with relevant information as requested in the Union's February 11, 2015 and March 3, 2015 letters (as modified in its March 26, 2015 letter). Accordingly, the settlement agreement in the above-captioned cases is vacated and set aside.

2. By the conduct described above in part II, paragraphs 1-3, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. The Respondent's unfair labor practices described above affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Jack Cooper Holdings d/b/a Jack Cooper Transport engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found

that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information, we shall order the Respondent to provide all outstanding information that it unlawfully withheld.[17]

ORDER

The Respondent, Jack Cooper Holdings, d/b/a Jack Cooper Transport Co., Kansas City, Missouri, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, General Drivers, Warehousemen & Helpers Local Union No. 89 (the Union), by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act,

(a) Furnish to the Union in a timely manner all outstanding information requested on February 11, 2015, and March 3, 2015, as modified on March 26, 2015, that has been unlawfully withheld.

(b) Within 14 days after service by the Region, post at its facilities in Kansas City, Missouri, and Louisville, Kentucky, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice of all current employees and former employees employed by the Respondent at any time since February 20, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 15, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

This proceeding is a bit complicated. For one thing, it involves a motion for default judgment in two settled cases (Nos. 09–CA–100184 and 09–CA–101258) (the Settled Cases). The Settled Cases were followed by the present case (No. 09–CA–150482), in which the same employer, Jack Cooper Transport, was found by the judge—and is today found by my colleagues—to have violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) by failing to provide requested information to the Union. However, the present case is itself complicated because (i) the Union seeks the information in order to assist in its pursuit of a pending work-preservation grievance under the parties' collective-bargaining agreement (CBA);[1] (ii) the CBA provides for the work-preservation grievance to be resolved by an arbitrator; (iii) the CBA imposes its own contractual obligation on the parties to provide relevant information to one another regarding any work-preservation grievance; and (iv) the CBA also contains detailed provisions regarding how any request-for-information dispute should be addressed—specifically, that the requesting party is to obtain a subpoena from the contractual Board of Arbitration, and that any failure to comply with the subpoena may be addressed through subpoena-enforcement proceedings in federal court pursuant to Section 301 of the

[17] As the General Counsel concedes that the Respondent has already complied with the affirmative remedy in the 2013 cases, we do not order any additional affirmative remedy in those cases.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Actually, two agreements are relevant to the instant case: the National Master Automobile Transporters Agreement (NMATA) and the Jack Cooper Work Preservation Agreement (WPA). As they pertain to this case, the NMATA and the WPA contain materially identical language. For ease of reference, I refer to them collectively as the CBA.

Labor Management Relations Act. Conspicuously absent from these detailed contractual provisions, which the parties themselves agreed upon, is any role for the National Labor Relations Board (NLRB or Board).

Given these facts, my colleagues and I have different views regarding the appropriate manner in which to deal with the request-for-information claim that has been brought to the NLRB in the present case (09–CA–150482). According to the judge, whose decision my colleagues uphold, the Board must resolve this request-for-information case, regardless of whatever provisions may exist in the CBA regarding such disputes, and regardless of CBA provisions that provide for contractual disputes to be resolved in grievance arbitration. Thus, my colleagues apply the established Board doctrine that the Board should *never* prospectively defer request-for-information disputes to arbitration. In contrast, my view is that the Board's involvement in this case will undermine the detailed contractual provisions agreed upon by the parties that squarely address (i) work-preservation grievances, (ii) the obligation of the parties to disclose relevant information regarding such grievances, and (iii) the manner in which any request-for-information dispute related to a work-preservation grievance should be resolved. Indeed, this case illustrates why I previously expressed disagreement with the doctrine that the NLRB should never defer information request disputes to arbitration. In *Endo Painting Service*,[2] I stated that an information-request dispute may appropriately be deferred prospectively to arbitration where, for example, the dispute may overlap with issues being arbitrated.[3] Indeed, in *General Dynamics*[4]—the leading case for the principle that information-request disputes should not be prospectively deferred to arbitration—the Board implicitly recognized that deferral to arbitration *may* be appropriate under certain circumstances.

On the record presently before the Board, I believe one thing is clear: the Board should respect the parties' mutual agreement, clearly expressed in the CBA, which may make it appropriate to defer Case 09–CA–150482 to arbitration. However, the record as it stands does not permit the Board to decide whether it *should* defer: because the judge rejected deferral out of hand, she did not conduct the multi-factor analysis necessary to determine whether deferral would be appropriate in this case.[5] Accordingly, I believe the Board should remand this question for resolution by the judge.[6]

Background

As stated above, my colleagues find that the Respondent violated Section 8(a)(5) of the Act by failing to provide requested information to the Union as alleged in three unfair labor practice charges. The two Settled Cases were filed in 2013 and were resolved by an informal settlement agreement. That agreement contained a noncompliance provision permitting the General Counsel to move for default judgment on the settled charges if the Respondent violated the Act "in any like or related manner." The charge in this case, filed in 2015, alleged that the "Employer refused to provide relevant information requested by the Union and needed to ascertain the scope of the Employer's breach of the parties [sic] 'Work Preservation Agreement.'"

The judge rejected the Respondent's request that she defer the information-request dispute to arbitration, and she found that the Respondent's failure to provide the requested information violated Section 8(a)(5). My colleagues affirm the judge's decision, and this has a cascading effect on the Settled Cases. Because the agreement resolving the Settled Cases provided that the General Counsel could issue complaint in those cases and move for default judgment if the Respondent subsequently violated the Act in a manner "like or related" to the allegations in the Settled Cases, my colleagues' Section 8(a)(5) finding in this case also results in the entry of a default judgment against the Respondent in the Settled Cases.

I do not reach the merits of these issues because, in my view, this case raises an important question about whether the Board should continue its current policy of nondeferral of information-request disputes in all cases, espe-

[2] 360 NLRB 485, 485 fn. 6 (2014), enfd. __ Fed. Appx. __, 2017 WL 929208 (9th Cir. Mar. 9, 2017). See also *Team Clean*, 348 NLRB 1231, 1231 fn. 1 (2005), in which a Board majority questioned continuing to adhere to a policy of nondeferral of information-request cases to arbitration.

[3] The Board's leading case dealing with prospective deferral to arbitration is *Collyer Insulated Wire*, 192 NLRB 837 (1971). Other Board cases address post-award deferral—i.e., deferring to an arbitrator's decision after it has issued. Those cases are inapplicable here, and I do not address them. The Agency determines whether to defer an unfair labor practice charge to arbitration by applying the factors set forth in *United Technologies Corp.*, 268 NLRB 557 (1984): (i) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (ii) whether there was a claim of employer animosity to employees' exercise of protected rights; (iii) whether the parties' contract provides for arbitration in a very broad range of disputes; (iv) whether the arbitration clause clearly encompassed the dispute at issue; (v) whether the employer had asserted its willingness to utilize arbitration to resolve the dispute; and (vi) whether the dispute was eminently well suited to resolution by arbitration. Id. at 558.

[4] 268 NLRB 1432 (1984).

[5] See supra fn. 3.

[6] Because I would remand Case 09–CA–150482 to the judge, I do not reach or pass on the General Counsel's motion for default judgment in the Settled Cases (09-CA-100184 and 09–CA–101258), the merits of which depend on whether the Respondent committed the 8(a)(5) violation alleged in Case 09–CA–150482.

cially when refusing to defer would detract from the parties' contractual grievance arbitration procedures. For the reasons expressed below, I believe this is a case where the Board's resolution of an information-request dispute would detract from the parties' contractual procedures, and I believe these facts warrant overruling the principle that the Board will *never* prospectively defer information-request disputes to arbitration.

The 2015 charge stems from a contractual grievance alleging that the Respondent had violated the "Work Preservation Agreement and Article 33 of the NMATA" entitled "Work Preservation." (GC Exh. 3.) The same day the Union filed its work-preservation grievance, it also sent the Respondent an information request "pursuant to Article 33, Section 4, of the [NMATA]." In its request, the Union stated that it was requesting information in conjunction with its grievance against the Respondent "for violating Article 33 of the [NMATA] and the Jack Cooper Work Preservation Agreement (WPA)." (GC Exh. 4.) As the Union's charge states, the purpose of the information request was "to ascertain the scope of the Employer's breach of the parties 'Work Preservation Agreement.'"

When the Union concluded that the Respondent had inadequately responded to its request for information, it filed the unfair labor practice charge with the Board. In doing so, however, the Union bypassed the contractual procedure spelled out in both the NMATA and the Work Preservation Agreement for resolving disputes concerning information requested in connection with a work-preservation grievance. Specifically, NMATA Article 33, "Work Preservation," contains a section entitled "Requests for Information." Article 33 states:

> In the event that a Work Preservation Grievance is submitted, the Employer or Union may request, in writing, specific relevant information, documents or materials pertaining to such grievance and the other party shall respond to such request within fifteen (15) days of the receipt of such request.
>
> If, and to the extent that, the Employer or the Union fails or refuses to comply with this request for information, for any reason, the Employer or the Union may request a subpoena duces tecum from the majority of the Board of Arbitration requiring that the information be produced by the Employer or the Union or any other entity or person. If, and to the extent that the subpoenaed party fails or refuses to comply with a subpoena issued by the majority of the Board of Arbitration, the Union or the Employer may seek enforcement of the subpoena in federal court pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended.
>
> If, and to the extent that the Employer or the Union fails to comply with this provision for any reason, the other party may argue that the Board of Arbitration should draw an adverse inference concerning the subject matter of the information that the party failed to provide the other party within fifteen (15) days.[7]

The parties' Work Preservation Agreement contains a parallel section:

> In the event the Union submits a grievance involving [Respondent] under the expedited arbitration procedure established in Article 33, Section 3 [of the NMATA] [Respondent] and Union shall provide all information, documents, or materials that are relevant in any way to the Union's grievance within fifteen (15) days of the receipt of any written request for such information, documents or materials by the Union or [Respondent]. If, and to the extent that, [Respondent] or the Union fails or refuses to comply with this request for information, for any reason, the [Respondent] or the Union may request a subpoena duces tecum from the majority of the Board of Arbitration requiring that the information be produced by the [Respondent] or the Union or any other entity or person. If, and to the extent that the subpoenaed party fails to comply with a subpoena issued by the majority of the Board of Arbitration, the Union or the [Respondent] may seek enforcement of the subpoena in federal court pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended. If and to the extent [Respondent] or Union fails to comply with this provision for any reason, the Union [or Respondent] may argue that the Board of Arbitration should draw an adverse inference against [Respondent] or Union concerning the subject matter of the information that [Respondent] or Union has failed to provide to Union or [Respondent] within fifteen (15) days.[8]

Thus, the NMATA and the Work Preservation Agreement set forth a contractual procedure both for requesting information in connection with work-preservation grievances and for addressing noncompliance with such requests. The procedure set forth in those agreements involves, at most, two forums: the Board of Arbitration and federal district court. Alternatively, if the requested party fails to comply with the contractual procedure for resolving an information-request dispute, the requesting

[7] R. Exh. 1.
[8] GC Exh. 2.

party may argue that the Board of Arbitration should resolve the dispute by drawing "an adverse inference concerning the subject matter of the information that the party failed to provide." In that case, the information dispute and the grievance will both be resolved in a single forum, i.e., the arbitral forum.

Discussion

The Labor Management Relations Act (LMRA) states a clear federal policy in favor of resolving industrial disputes through private, collectively bargained procedures: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." LMRA Section 203(d).

The centrality of grievance arbitration to collective bargaining was recognized by the Supreme Court in its *Steelworkers* trilogy,[9] where the Court stated that "the grievance machinery under a collective-bargaining agreement is at the very heart of the system of industrial self-government," and the Court praised that "machinery" as "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and . . . provid[ing] for their solution in a way which will generally accord with the variant needs and desires of the parties." *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. at 581. Indeed, the Court held that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." Id. at 578. This is a significant statement, since the NLRA declares it to be the policy of the United States to encourage "the practice and procedure of collective bargaining" in order to eliminate obstructions to commerce. NLRA Section 1. Thus, to encourage arbitration *is* to encourage "the practice and procedure of collective bargaining" in accordance with federal policy. Subsequent to issuing the *Steelworkers* trilogy, the Supreme Court (quoting with approval from a Board decision) re-emphasized this point, stating: "'Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration . . . contribute significantly to the attainment of this statutory objective'"—i.e., the objective set forth in Section 1 of the Act. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (quoting *International Harvester Co.*, 138 NLRB 923, 926 (1962)). In keeping with the federal policy in favor of grievance arbitration, the Board has long favored arbitration as the preferred means of resolving industrial disputes where they are "essentially . . . dispute[s] over the terms and meaning of the contract." *Collyer Insulated Wire*, 192 NLRB at 837. The Board has recognized that such disputes are better "resolved by arbitrators with special skill and experience in deciding matters under established bargaining relationships than by the application by this Board of a particular provision of our statute." Id. at 839.

In the instant case, the parties have entered into two collective-bargaining agreements, each of which contains detailed procedures, in connection with work-preservation grievances, for requesting information and resolving disputes over those requests. Both agreements provide that after a work-preservation grievance is submitted, either party "may request, in writing, specific relevant information." If the other party fails to comply with the information request, the requesting party may "request a subpoena duces tecum from the majority of the Board of Arbitration." If the subpoenaed party still does not comply, the requesting party may seek enforcement of the subpoena in federal court. And if all else fails, in the grievance arbitration hearing the requesting party may "argue that the Board of Arbitration should draw an adverse inference concerning the subject matter of the information that the [requested] party failed to provide." As these procedures demonstrate, the NMATA and the Work Preservation Agreement clearly reflect a considered choice by the parties to a collective-bargaining relationship to craft "a system of private law" to resolve both anticipated work-preservation disputes *and* disputes over related requests for information. *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. at 581.

Nothing in the Act prohibits the parties from adopting this approach.[10] To the contrary, as explained above, federal law and federal labor policy alike favor the resolution of industrial disputes through arbitration. Nonetheless, the Board has inflexibly refused to prospectively defer information-request disputes to arbitration. The leading case in this area is *General Dynamics*, supra.

In *General Dynamics*, the employer subcontracted certain bargaining-unit work to an outside firm after discovering serious defects in a product manufactured by its

[9] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[10] Although Sec. 10(a) of the Act reserves to the Board the power to resolve unfair labor practice allegations and provides that "[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," Sec. 10(a) does not mandate that the Board exercise its power in every case. To the contrary, "'the Board has considerable discretion to . . . decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.'" *Carey v. Westinghouse Electric Corp.*, 375 U.S. at 271 (quoting *International Harvester*, 138 NLRB at 926).

unit employees. Around the same time, the employer commissioned a study of the unit employees' workmanship by a professor from the Massachusetts Institute of Technology. The union requested a copy of the MIT study for the purpose of determining whether to proceed with grievances regarding the subcontracting decision. The employer refused the union's request. The union decided to proceed with the grievances anyway and filed a Board charge to obtain the MIT study. The employer urged the Board to defer the case to arbitration, but the Board found deferral inappropriate, explaining as follows:

> [T]he procedural issue of disclosure of the study is merely preliminary to the resolution of the parties' substantive dispute over the subcontracting. In these circumstances, we find no merit in encumbering the process of resolving the pending subcontracting grievances with the inevitable delays attendant to the filing, processing, and submission to arbitration of a new grievance regarding the information request. Such a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration.

268 NLRB at 1432 fn. 2.

Thus, the rationale for the Board's decision in *General Dynamics* not to defer the information-request dispute at issue in that case to arbitration was its belief that deferral would detract from the expeditious resolution of the underlying subcontracting grievance due to "inevitable delays attendant to the filing, processing, and submission to arbitration" of a second, separate grievance "regarding the information request." Id. That rationale does not apply in the instant case, and I believe it no longer applies generally. Regarding this case, deferral would not entail a second, separate grievance. The parties have a contractual procedure for resolving information-request disputes in connection with work-preservation grievances, and that procedure does *not* require a second grievance to be filed, processed, and submitted to arbitration. Thus, there is no reason to think that the Union's work-preservation grievance would be resolved any less expeditiously if the disposition of the parties' related information dispute were left to their agreed-upon contractual mechanism. More generally, the Board in *General Dynamics* disregarded the fact that nondeferral *also* results in a "two-tiered" process, with the substantive grievance decided by the arbitrator and the information dispute decided by the Board. And whereas a "two-tiered arbitration process" is limited to a single forum—the arbitral forum—the two-tiered process resulting from nondeferral involves at least two forums—the arbitral forum and the Board—and two forums become three if appeal is taken from the Board's order to a federal court of appeals.

I share the goal the Board expressed in *General Dynamics* of seeking to ensure the expeditious resolution of grievances in arbitration. However, the Board's holding in *General Dynamics* was paradoxical—to further the "national policy" favoring arbitration, the Board refused to defer the case to arbitration—and this holding produces an incongruous outcome in the present case. Here as in *General Dynamics*, my colleagues ostensibly advance the "national policy" favoring arbitration by *refusing* to defer to the mutual agreement of the parties reflected in CBA provisions that impose a *contractual* obligation on the parties to disclose relevant information pertaining to work-preservation grievances, and that provide for the resolution of information-request disputes pursuant to procedures that *do not* involve the NLRB. In my view, this outcome cannot be reconciled with the federal policy in favor of arbitration when it has been agreed upon by the parties as the means of resolving certain disputes.

It is also important to recognize that the Board's involvement in the instant case has likely impeded the expeditious resolution of the parties' contractual dispute. Perhaps in 1984, when *General Dynamics* was decided, it was true that grievances typically would be resolved more quickly if the union obtained information relevant to the grievance through the Board's processes rather than through contractual procedures. At present, however, unfair labor practice cases can take 3 to 5 years to be resolved, and sometimes they take much longer.[11] If the Board's recent experience is any indication, efforts to resolve any information dispute in Board proceedings is far more likely to delay the resolution of the grievance than to expedite it.

Consider what an unfair labor practice proceeding entails. It commences with the filing of a charge in one of the Board's regional offices. The charge is investigated. The investigation may involve subpoenas, and disputes over subpoena enforcement may have to be decided by the Board. If after investigation the charge is deemed meritorious, complaint issues, followed by a hearing before an administrative law judge. After the hearing, the parties file posthearing briefs to the judge. The judge must then write a decision, and the judge's decision is subject to "exceptions." In other words, it may be appealed to the Board. If exceptions are filed, further brief-

[11] See, e.g., *CNN America, Inc.*, 361 NLRB 439 (2014) (involving 82 days of hearings, more than 1,300 exhibits, more than 16,000 pages of transcript, and more than 10 years of Board litigation, followed by court proceedings), enfd. in part and enf. denied in part No. 15-1112, 2017 WL 3318834 (D.C. Cir. Aug. 4, 2017).

ing ensues, and the case is processed at the Board's headquarters in Washington, D.C. Board members may disagree with one another regarding one or more issues, or they may agree on the result but disagree as to the rationale for the result, in which case both a majority opinion and one or more dissenting and/or concurring opinions must be written before the Board's decision issues. In all this, one thing is certain: this process takes time—often, a great deal of time.

Nor are the delays associated with Board resolution of information-request disputes merely hypothetical. Consider the timeline of this case. The Union requested the information on February 11, 2015. It filed an unfair labor practice charge on April 20, 2015, and complaint issued August 31, 2015. The judge issued a 15-page decision on January 27, 2016. The Board issues its decision today, roughly 2 years after the complaint issued and well over 2 years after the charge was filed. And this may not be the end. The Respondent may decide to file a petition for review in a federal court of appeals. If that happens, there will be more briefing, the court may order oral argument, and the court will have to write yet another decision. Given the delays inherent in the processing and resolution of unfair labor practices, it seems to me that information disputes would typically be resolved more quickly by letting the arbitrator address them. That is especially true where, as in this case, the parties' agreement sets forth a procedure for requesting information and for resolving disputes regarding such requests.[12]

It again bears emphasis that arbitration is the preferred means of resolving industrial disputes as a matter of federal policy as reflected in LMRA Section 203(d), which provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Not *a* desirable method. *The* desirable method. Furthermore, Section 203(d) does not say that adjustment by a method agreed upon by the parties is the desirable method for resolving grievances *unless they can be resolved more quickly by a different method*. Rather, Section 203(d) states a categorical preference for collectively bargained methods of grievance processing. These considerations weigh in favor of deferring information-request disputes to arbitration, particularly where the requested information relates to an ongoing grievance. On the other hand, I agree that in some circumstances, Board resolution of an information-request dispute promotes and preserves the integrity of grievance arbitration—for example, when a party seeks relevant information to assess whether to initiate contractual grievance or arbitration procedures in the first place. However, such concerns are clearly not implicated in the present case.

Here, I believe it is far more likely that the federal policy embodied in LMRA Section 203(d) would be more effectively promoted under a doctrine that permits information-request disputes to be deferred to arbitration. As I stated in *Endo Painting Service*, citing LMRA Sec. 203(d), deferring an information-request dispute to arbitration is appropriate where "nondeferral would result in duplicative litigation that undermines the role played by arbitration as the method agreed upon by the parties for the final adjustment of disputes involving interpretation of collective-bargaining agreements." 360 NLRB at 485 fn. 6. Under the procedure set forth in the CBA, both the grievance and the information-request dispute may be resolved in a single forum—the arbitral forum. That is what happens if a requested party fails to comply with the contractual procedure regarding requested information: the arbitrator may resolve the information dispute by drawing an adverse inference against the requested party "concerning the subject matter of the information that the party failed to provide." Otherwise,

[12] My colleagues cite statistics showing that in fiscal year 2016, 82.7 percent of all meritorious unfair labor practice cases were resolved within 365 days of the filing of the charge, and 70.8 percent of all meritorious unfair labor practice cases were resolved within 120 days of charge filing. These statistics need to be placed in context. First, a "meritorious" unfair labor practice case means only that the Region decided to issue complaint *alleging* one or more unfair labor practices. It does not mean that the Board, or a reviewing court, *found* one or more allegations to have merit. Also, "meritorious" cases may be and are resolved in a variety of ways, including through default judgment when the respondent fails to file an answer and through voluntary settlement. Indeed, the statistics cited by my colleagues dwindle to insignificance when one adds that in fiscal year 2016, *93 percent of meritorious unfair labor practice cases were resolved by settlement*.

My colleagues' argument that permitting deferral of information-request disputes to arbitration would result in delays is unpersuasive. First, they say that delay would result from the regional director having to apply the *Collyer* factors to determine whether deferral of particular information-request disputes is appropriate. Should the Board change its policy and allow information-request disputes to be deferred to arbitration under *Collyer*, the regional directors would make those decisions, just as they make *Collyer* deferral decisions in other types of cases—before complaint ever issues, and promptly after the filing of the charge. This prompt determination is surely more expeditious than the process of litigating an unfair labor charge from initial filing to ultimate resolution by the Board or perhaps even a circuit court. My colleagues also point to the delay that would result in *this* case if the case were remanded to the judge to perform the necessary *Collyer* analysis. But if my position were accepted, this would be the *only* case where such a remand is necessary, since the Board's judges would perform the analysis on the first go-round (in the relatively rare instances when a *Collyer* deferral issue even reaches an administrative law judge).

deferral would mean that two forums would be involved: the arbitral forum for the grievance, and federal district court for the information dispute. In contrast, following the existing policy of nondeferral *guarantees* that at least two forums are required: the Board to resolve the information dispute, and the arbitrator to resolve the work-preservation grievance. Furthermore, adding the Board to the mix does not promise a speedier resolution, since the Board's processes are complex and time-consuming, as explained above—and if appeal is taken from the Board's decision to a federal court of appeals, two forums will become three.[13] Moreover, I also believe that arbitrators are generally in a better position than the Board to determine what information a requesting party needs, given the close connection between that issue and the merits of the grievance itself, which the arbitrator must resolve, not the Board. As I also stated in *Endo Painting Service*, deferring an information-request dispute to arbitration is appropriate where "the scope of an information request would be significantly affected by the merits of a particular grievance pending arbitration." Id.

In sum, although the assumption of *General Dynamics* was that nondeferral would result in a speedy disposition of the information dispute and thus a speedier resolution of the related substantive grievance than would deferral and a "two-tiered" arbitration process, "[e]xperience has demonstrated" that the opposite is true. *Collyer*, 192 NLRB at 837. Arbitration is intended to be, and usually is, a more efficient means of resolving disputes than more formal legal processes such as the Board's; indeed, this is one of arbitration's key selling points. Accordingly, in order to be true to the intent of *General Dynamics* to further the "national policy favoring the voluntary and expeditious resolution of disputes through arbitration," *General Dynamics*, 268 NLRB at 1432 fn. 2, I believe the Board should abandon its policy of nondeferral of information-request disputes.[14] Moreover, even where nondeferral of an information dispute would lead to as quick a resolution of the underlying grievance as would deferral, the balance must tip in favor of deferral in order to leave the dispute to be resolved in accordance with the procedure "agreed upon by the parties." LMRA Section 203(d).[15]

To be clear, I am not proposing that the Board replace its blanket rule that it will *never* defer an information-request dispute to arbitration with an equally broad and inflexible rule that would result in deferring *all* such disputes to arbitration. Rather, I support the common-sense proposition that the applicable standard should be flexible enough to *permit* the Board to decide whether the circumstances of a particular case make deferral appropriate.[16] My colleagues, on the other hand, defend the existing inflexible rule, which puts a straitjacket on the Board in all cases, regardless of specific facts that, if considered, may strongly favor deferral to arbitration.

Additionally, my colleagues' arguments do not add up to a rational defense of the extant blanket prohibition of deferral.

For starters, my colleagues defend the current rule against ever deferring an information-request dispute to arbitration on the basis that the Act creates a broader obligation to furnish requested information than is created by the CBA in this case. That is, under the parties' CBA, the procedure for obtaining relevant requested information is triggered by the filing of a grievance, whereas under the Act, a party can request information to determine *whether* to file a grievance. Based on this distinction, one might reasonably argue that, in a particular case involving this type of CBA provision, if the party has requested information to determine *whether* to file a grievance, deferral of an information-request dispute might be inappropriate. However, the possibility that such facts might weigh against deferral in a particular case does not justify nondeferral of information-request disputes in *all* cases, nor do the facts support nondeferral in *this* case. Here, for example, my colleagues' argument is irrelevant, since the Union *did* file a grievance. Thus, although the broader right of access to information inherent in Section 8(a)(5) may counsel nondeferral of information disputes in certain cases, it does not support the Board's blanket rule prohibiting deferral in all cases.

[13] My colleagues point out that deferral here could also involve two forums, the arbitrator and a federal court. I do not dispute the point. The fact remains, however, that my colleagues defend a blanket rule of nondeferral that *guarantees* the involvement of *at least* two forums and potentially a third, whereas deferral in this case would involve *at most* two forums.

[14] As my colleagues admit, "whether to defer to arbitration is a matter within the Board's discretion."

[15] If a deferred 8(a)(5) charge were not being addressed within the parties' contractual mechanism within a reasonable period of time, the Board might appropriately accord greater weight to the policies underlying Section 10(a) of the Act and resume processing the charge. Again, NLRA Sec. 10(a) relevantly provides that the Board's power to resolve unfair labor practice allegations "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."

[16] As my colleagues correctly note, should the Board change its nondeferral policy, prearbitral deferral decisions in particular cases would mostly be made by the regional directors, not by the Board itself. See fn. 12, supra.

My colleagues also defend a blanket rule of nondeferral in all information-request cases by disputing my point that in *some* cases, including this one, the arbitrator is in a better position than the Board to adjudicate the information-request dispute. Again, this argument does not support a blanket prohibition against deferral of information-request disputes. My colleagues state that "[a]t the early stages of investigating a grievance, the information sought is often of a broader nature than the issue that ultimately gets submitted to an arbitrator," and "the Union likely has not conclusively determined the scope of the issue that it ultimately submits for arbitration." Even if these statements apply in a particular case, it does not follow that the Board is *always* better suited than an arbitrator to resolve the parties' information-request dispute. For example, in the instant case, it appears that the Union understood the scope of the underlying work-preservation issue that was addressed in the Union's grievance. But even if the Union requested information in order to evaluate the contours of its grievance, it is unreasonable to conclude that the Board will *always* be better positioned to resolve such disputes than an arbitrator. Indeed, considering that the parties in this case have an agreement devoted exclusively to one specific type of grievance—i.e., work-preservation grievances—it is highly likely that the Board of Arbitration referred to in the CBA has dealt with work-preservation grievances before and with related information-request disputes. A more flexible deferral standard would permit the Board to take such experience and expertise into account. The Board's blanket rule of nondeferral precludes any evaluation of such considerations.

Finally, my colleagues support the blanket nondeferral standard by relying on *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). But *Acme Industrial* does not support a blanket rule under which the Board can never defer any information-request dispute to arbitration.

First, instead of dealing with the proposition defended by my colleagues—that the Board *must* decide all information-request disputes—*Acme Industrial* dealt with the opposite question: whether the Board could *ever* decide such disputes when the parties have agreed to grievance arbitration. In *Acme Industrial*, the Supreme Court reviewed a Seventh Circuit decision finding that the Board was "foreclosed" from deciding information-request disputes whenever a CBA contained "a provision for binding arbitration."[17] The Supreme Court held that the Board was *permitted* to decide disputes over information requests, even when the CBA contained a grievance arbitration procedure, but the Supreme Court certainly did not find that the Board could *never* defer such disputes to arbitration.[18] I do not argue anything like the position that the Supreme Court rejected in *Acme Industrial*. That is, I do not contend that the Board is prohibited from deciding information-request disputes when the parties' CBA provides for grievance arbitration. Again, I merely maintain that a reasonable standard should *permit* the Board to decide whether it may be appropriate, in particular cases, to defer an information-request dispute to arbitration.

Second, the collective-bargaining agreement in *Acme Industrial* was materially different from the parties' CBA here. The agreement at issue in *Acme Industrial* set forth a generic grievance-arbitration procedure—not, as here, a specific procedure for resolving information-request disputes related to a particular type of grievance. Indeed, the Board, when deciding *Acme Industrial*, observed that "the contract *does not contain a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances*." *Acme Industrial Co*., 150 NLRB 1463, 1465 (1965) (emphasis added). In the instant case, in contrast, the parties' contract *does* contain a clause "dealing specifically with the furnishing of information necessary and relevant to the processing of grievances." Id. Moreover, I am not claiming that this type of clause *always* warrants deferral. I claim only that it is unreasonable to adhere to a standard that prevents the Board from even considering this type of contract clause when deciding whether to defer certain types of information-request disputes to arbitration, particularly when other facts may likewise warrant deferral.

One final consideration strongly undermines the Board's current standard. In the instant case, the parties *mutually agreed* to CBA provisions relating to the arbitration of information-request disputes pertaining to work-preservation grievances. The Board has a duty "to encourage the practice and procedure of collective bargaining,"[19] and this duty requires the Board to at least *permit* an information-request dispute to be resolved in arbitration when parties have agreed to do so. I do not see how it furthers the purposes of the Act to bypass the parties' own agreement. To the contrary, deferral in this case effectuates the purposes of the Act by furthering the "arbitration of labor disputes," which is "part and parcel of the collective bargaining process itself."[20] *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. at 578.[21]

[17] 385 U.S. at 435.

[18] Id. at 437.

[19] NLRA Sec. 1.

[20] Unlike my colleagues, I find it immaterial that the Respondent has also filed an unfair labor practice charge seeking resolution of its own request for information. That both parties have disregarded the contractual procedure to which they agreed does not warrant nondeferral to

CONCLUSION

Consistent with the above analysis, I believe the Board should consider deferring the Section 8(a)(5) allegation in the instant case to arbitration. However, under the Board's traditional approach to deferral, there must be further analysis before a determination may be made that deferral is appropriate.[22] Thus, I would remand to the judge to perform the requisite analysis, reopening the record if necessary to receive additional relevant evidence.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with General Drivers, Warehousemen & Helpers Local Union No. 89 (the Union), by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of Respondent's unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner all outstanding information requested on February 11, 2015, and March 3, 2015, as modified on March 26, 2015, that has been unlawfully withheld.

JACK COOPER HOLDINGS D/B/A JACK COOPER TRANSPORT CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-150482 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Eric Brinker, Esq. and *Daniel Goode, Esq.,* for the General Counsel.
Kenneth W. Zatkoff, Esq., for the Respondent.
David O. Suetholz, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Louisville, Kentucky, on November 17, 2015. General Drivers, Warehousemen & Helpers Local Union No. 89 (Union) filed the charge on April 21, 2015,[1] and the General Counsel issued the complaint on August 31 and an erratum on September 4. (GC Exh. 1(c), (g).) The complaint alleges that Jack Cooper Holdings d/b/a Jack Cooper Transport Co. (Re-

that procedure. Moreover, the Respondent urged the Board to defer this case.

[21] In *Steelworkers v. Warrior & Gulf Navigation Co*., supra, the Supreme Court reasoned that when evaluating arbitrability, courts "must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582–583. Although *Warrior & Gulf* involved questions about arbitrability arising in court proceedings alleging breach of a collective-bargaining agreement, I believe there is no reasonable basis for the Board to disregard the parties' own language governing arbitrability by applying a standard that does not permit the Board to even consider such language when evaluating deferral of information-request disputes to arbitration.

[22] See the factors set forth in fn. 3, supra.

[1] All dates are in 2015 unless otherwise indicated.

spondent)[2] violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to provide requested and relevant information to the Union.[3] (GC Exh. 1(c).) Respondent timely filed an answer to the complaint denying the alleged violation of the Act and asserting several affirmative defenses. (GC Exh. 1(i).) The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Jack Cooper Holdings (Holdings), a corporation, is engaged in the interstate transportation of freight from its facility in Kansas City, Missouri, where it annually derives gross revenues in excess of $50,000 as an agent for various common carriers, which operate in and between various states other than the State of Missouri. Respondent Jack Cooper Transport Co. (Transport), a corporation, is also engaged in the interstate transportation of freight from its facility in Louisville, Kentucky, where it annually derives revenues in excess of $50,000 for services performed in states other than the Commonwealth of Kentucky. The parties have stipulated, and I find, that Respondent Holdings and Respondent Transport are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents have further admitted, and I find, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Union is the largest automobile transport (carhaul) local union in the United States. Fred Zuckerman has served as the Union's president since January 2000. Zuckerman also has 35 years of experience as a driver in the carhaul industry.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations

Respondent Transport is a controlled subsidiary of Respondent Holdings. Respondent is engaged in the transportation of automobiles throughout the United States. In Louisville, Kentucky, Respondent serves three automobile plants: Ford Louisville Assembly Plant; GM Kentucky Truck Plant; and the Bowling Green Corvette Plant. Respondent also serves two railheads. Curtis Goodwin is the Senior Vice President/Labor Relations for Respondent. Respondent admits, and I find, that Goodwin is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Respondent is signatory to the National Master Automobile Transporters Agreement (NMATA). This agreement is negotiated between the Teamsters National Automobile Transporters Industry Negotiating Committee (TNATINC)[5] and signatory employers. (GC Exh. 2; R. Exh. 1.) Article 33 of NMATA concerns work preservation and outlines a special procedure for filing grievances regarding work preservation. (R. Exh. 1.) Section 4 of Article 33 of NMATA concerns information requests made pursuant to work preservation grievances and states, inter alia:

> In the event that a Work Preservation Grievance is submitted, the Employer or Union may request, in writing, specific relevant information, documents or materials pertaining to such grievance and the other party shall respond to such request within fifteen (15) days of the receipt of such request.

(R. Exh. 1.) The NMATA goes on to state that if a party fails to comply with such a request for information, the other party may request a subpoena duces tecum from the Board of Arbitration. If a party fails to comply with the subpoena duces tecum, the other party may seek enforcement of the subpoena in federal court pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended. A party may also argue that the Board of Arbitration should draw an adverse inference concerning the subject matter of the information that the other party failed to provide.

Respondent is also signatory to the Jack Cooper Work Preservation Agreement (WPA). (GC Exh. 2.) The WPA prohibits Respondent from subcontracting, transferring, or leasing unit work. The WPA further prohibits Respondent Holdings from permitting any controlled affiliate, other than Respondent Transport, from performing unit work. Moreover, Respondent agreed that it would not engage in any scheme, transaction, restructuring, or reorganization that permits it or any controlled affiliate to evade the protection of carhaul work or to assign or permit the performance or assignment of carhaul work outside the terms of the WPA.

On January 19 or 20, the Union learned through one of its members that Respondent may have been diverting unit work to nonunion carriers. (Tr. 17; 19.) The Union immediately began investigating the alleged diversion of unit work and reached the conclusion that Respondent had violated NMATA and the WPA. Tr. 19. Thereafter, the Union filed a grievance against Respondent for these alleged violations on February 11.[6] (GC Exh. 3.)

On February 11, the same day as the Union filed its grievance, Zuckerman sent a letter to several senior managers of Respondent, including Goodwin. GC Exh. 4. In his letter, Zuckerman sought various pieces of information, including:

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[2] Respondent Transport and Respondent Holdings will be referred to collectively as "Respondent" herein.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "CP Exh." for the Charging Party Union's Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's brief; "CP Brief" for the Union's brief; and "GC Br." for the General Counsel's brief.

[4] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[5] TNATINC negotiates NMATA on behalf of itself and local unions affiliated with the International Brotherhood of Teamsters.

[6] Local unions are permitted to police NMATA and file grievances under NMATA. Tr. 18–19.

(3) The number of employees associated with Jack Cooper Transport that Jack Cooper Logistics, LLC has utilized since January 1, 2013 to engage in its carhaul operations;
(4) A list of all trips Jack Cooper Logistics has pulled or leased since January 1, 2013, and the names of the drivers or contractors who pulled those trips;
(5) With respect to the request set forth above in Paragraph 4, please provide a separate list of all trips (including the dates of those trips, along with a complete account of the vehicles being hauled) Jack Cooper Logistics has pulled or leased since January 1, 2013, which Jack Cooper Logistics has reason to believe is bargaining unit work under the NMATA;
(11) Explain whether Jack Cooper Logistics, LLC bid on any new car traffic with any manufacturer or other entity since they have been in business whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings;
(12) If Jack Cooper Logistics, LLC has bid on work as outlined in paragraph 11 above please identify the new car traffic/manufacturer-entity/locations/dates that Jack Cooper Logistics, LLC bid whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings;
(13) If Jack Cooper Logistics, LLC has bid on work as outlined in paragraph 11 above and Jack Cooper Logistics, LLC was awarded new car traffic from a manufacturer or other entity please provide copies of the contracts with the manufacturers or any other entities who awarded the contract. Please redact any information that is confidential or proprietary;
(15) Does Jack Cooper Transport Company have any Article 2 Section 8 agreements with any Local Union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars;
(16) If the answer to number 15 above is "yes", please provide copies of those agreements with the approvals from the National Automotive Transporters Joint Arbitration Committee;
(17) Does Jack Cooper Transport haul used cars, auction cars, secondary market cars, and/or rental cars (now or in the past) not covered by an Article 2 Section 8 Agreement;
(18) If the answer to number 17 above is 'yes' please identify the traffic in question;
(19) Please provide a list of all trips leased by Jack Cooper Logistics, LLC out of the Manheim New Jersey terminal, the name of the company to which the load was leased and a list of the vehicles transported.

(GC Exh. 4.)

At the hearing, Zuckerman explained the Union's need for the information sought in his February 11 letter. The Union sought the information in items 3 and 4 to see if Respondent was, in fact, diverting unit work to other carriers in violation of NMATA and the WPA. (Tr. 20–21.) In addition, the Union required this information to determine which entities were diverting work and to which entities the work was being diverted. Thus the information sought in items 3 and 4 was necessary for the Union to enforce NMATA and the WPA on behalf of its members. Zuckerman further testified that, based on his 35 years in the industry, this information would be needed for arbitration of the Union's grievance. Zuckerman further testified that, based on his experience as a carhaul driver, Respondent would maintain vehicle transit orders identifying the drivers or contractors who pulled trips for Respondent. (CP Exh. 1; Tr. 50–51.)

The information requested in item 5 was also needed for arbitration, according to Zuckerman. This information would identify wage disparities and standards needed to present the Union's grievance to an arbitrator. He testified that this information would further be needed to refute any argument Respondent might raise as to whether the work in question was covered under the WPA.

Zuckerman further testified that the Union needed the information requested in items 11, 12, and 13 to prove the Union's theory that Respondents violated the WPA by diverting new carhaul work to a nonunion carrier to an arbitrator. (Tr. 25–26.) In item 13, the Union advised Respondent that it could redact any confidential or proprietary information from its response. Zuckerman testified that although the Union needed the information it was seeking for arbitration, it did not want confidential or proprietary information. (Tr. 26.)

Zuckerman requested the information in item 15 to dispute Respondents' potential argument that the vehicles listed in item 15 were not covered by the WPA. (Tr. 26.) Zuckerman explained that over the years Respondent has taken the position that auction cars, used cars, secondary market cars, and rental cars are not covered under the WPA. The Union wanted to establish that Respondent has been hauling these types of cars for years and that any position Respondent might take that these cars were not covered under NMATA and the WPA was wrong. (Tr. 26–27.) The Union sought the information in item 16 for the same reasons.

In addition, Zukerman testified that Article 2, Section 8 has not always been a part of NMATA. It was added in 1989 to allow local unions and union companies to negotiate lower wage rates and remain competitive. Under an Article 2, Section 8 agreement, local unions may, with the approval of their members, negotiate lower wage rates. Thus, cars may be hauled under an Article 2, Section 8 agreement or under a full-rate agreement. The Union requested the information in items 17 and 18 to establish whether some of the diverted work had been done under full-rate agreements. The Union would further need this information to establish at arbitration that Respondent was diverting unit work in violation of the WPA.

The Union sought the information requested in item 19 because Manheim, New Jersey was the specific location where Respondent had allegedly violated the WPA as alleged in the grievance. The Union had been made aware by one of its members that Respondent used a company called Virginia Auto Transport to move traffic from Manheim, New Jersey. Thus, the Union sought this information to establish how many loads Respondent may have diverted from union carriers.

Under NMATA, Respondent had 15 days to respond to the Union's information request. Respondent did not reply within 15 days. As of the date of the hearing, Respondent had not provided the information requested by the Union in Zuckerman's February 11 letter.

On February 27, the parties held a local level hearing via telephone on the Union's grievance. (Tr. 32.) During the hearing, Goodwin stated that Mike Cunningham[7] had been in Kansas City in August to do an audit. Goodwin did not offer any further detail regarding this audit.

On March 3, the Union sent a second information request to Respondent.(GC Exh. 5.) This second request sought additional information and served to clarify some of the Union's earlier information requests. In the March 3 letter, the Union sought:

> (2) Any documentation, memorandum or evidence supporting Jack Cooper's position that "used car traffic is not considered carhaul work";
> (3) Any audit finding from the International Brotherhood of Teamsters concerning Jack Cooper Logistics or one of its subsidiaries.

(GC Exh. 5.)

Zuckerman testified that the Union needed the information sought in items 2 and 3 above based upon Respondent's position at the local hearing that used car traffic is not considered carhaul work under the WPA. Tr. 31. The Union was seeking any information Respondent may have had to rebut Respondent's theory that what it was doing did not violate NMATA and the WPA. Regarding the audit, Zuckerman believed that it was important to discover the importance of what Goodwin was talking about during the local hearing in order to properly process the grievance.

Again, under NMATA, Respondent had 15 days to respond to the Union's information requests. As of the date of the hearing, Respondent had not yet provided the information requested on March 3.

On March 13, Respondents sent a letter signed by Goodwin to Zuckerman. (GC Exh. 6.) This letter indicated that it was a response to the Union's February 11 information request. In the letter, Respondent disputed the relevance of the information sought by the Union. Elsewhere the letter stated that Respondent was searching for the information, but was unsure when it would be able to respond. Respondent also claimed that one of the Union's requests (item 3) was too vague or ambiguous for it to formulate a response. The letter did not provide any information responsive to the Union's information requests. In addition, Respondent's March 13 letter demanded that the Union execute a confidentiality agreement. However, the letter did not provide any such agreement for the Union to sign.

On March 18, Respondent sent a letter to the Union responding to Zuckerman's March 3 information request. (GC Exh. 7.) This letter disputed the relevance of the Union's request for information regarding its position that used car work is not carhaul work. Respondent asked the Union to provide it with a "sufficient factual basis" to establish the relevance of this request. Respondent further stated that the Union's request for an "audit finding" was too vague and ambiguous to determine what the Union was seeking. Respondent again demanded that the Union enter into a confidentiality agreement before it would provide any information regarding an audit finding. Respondent did not provide any documents or information responsive to the Union's February 11 or March 3 request.[8]

On March 26, the Union sent a renewed request for information to Respondent.[9] (GC Exh. 8.) Zuckerman also responded to the concerns raised by Respondent in its March 13 and 18 letters. Tr. 39. He indicated that the Union was willing to sign a nondisclosure agreement. He also discussed the relevance of certain information sought. In addition, Zuckerman clarified some of his earlier requests. He testified that by his use of certain terms (i.e. "trip lease" or "leased") Respondent responded that it did not "lease," and thus was arguing over semantics. (Tr. 50.) Therefore, Zuckerman amended his earlier requests to use more modern terms, i.e. "brokered."

Goodwin sent a response to Zuckerman on April 10. (GC Exh. 9.) Respondent continued to object to the relevance of the Union's requests. Respondent did not provide any documents to the Union regarding the information requests contained in the complaint.[10]

On April 27, the Union's attorneys sent a letter to Respondent regarding the information requests. (GC Exh. 10.) The letter indicated that the Union had agreed to sign a confidentiality agreement and that Respondent never provided any of the requested information.

Respondent offered as evidence four Memoranda of Agreement between the Union and Respondent. (R. Exhs. 2, 3, 4, 5.) These agreements allow for carhaul work to be performed at a reduced rate under Article 2, Section 8 of NMATA. Respondent's counsel argued that the Union did not need copies of Article 2, Section 8 agreements with any other local unions regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars (item 15 of the February 11 request) because the Union had four such agreements in its possession. Tr. 69–71.

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

[7] Cunningham is an economist employed by the International Brotherhood of Teamsters (IBT).

[8] The remainder of the information requests from March 3 and Respondent's responses in its March 18 letter are not at issue in this case.

[9] The March 26 letter also responded to information requests that had been made by Respondent, which are not at issue.

[10] The information attached to Respondent's April 10 letter was related to information requests that are not at issue in this case.

Only one witness testified at the hearing: Union President Kenneth Zuckerman. Most of Zuckerman's testimony concerned the Union's jurisdiction and the Union's collective-bargaining agreements; all topics which fall squarely within his sphere of knowledge as the Union's president. I found Zuckerman to be a credible witness. His testimony was consistent with the documentary evidence presented at the hearing and he appeared sure and knowledgeable when giving his testimony. He testified in a direct and forthright manner and his testimony did not waver on cross-examination. Therefore, I credit Zuckerman's testimony.

B. Respondent Violated the Act by Failing and Refusing to Provide Requested Information to the Union

In its information request, the Union sought information regarding: the number of employees used by Respondent in its carhaul operation; a list of trips pulled or leased (or brokered or in any way transferred) by Respondent and the names of drivers or contractors who pulled those trips; a separate list of trips pulled or leased (or brokered or in any way transferred) that Respondent believes are bargaining unit work under NMATA; whether Respondent Logistics has bid on (or been awarded any spot buys for) any new car traffic directly or through any affiliate and, if so, a list of new car traffic bid (or awarded) and copies of the contracts for these bids (or awards) with any confidential or proprietary information redacted; whether Respondent has any Article 2, Section 8 agreements with any local union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars, and, if so, copies of those agreements; whether Respondent hauls used cars, auction cars, secondary market cars, and/or rental cars not covered by an Article 2, Section 8 agreement and, if so, information regarding such traffic; a list of all trips leased by Respondent out of the Manheim, New Jersey terminal, the company to which the load was leased, and a list of the vehicles transported; any documentation or evidence supporting Respondent's position that used car traffic is not carhaul work; and any audit finding from the IBT concerning Respondent of one of its subsidiaries. GC Exhs. 4; 5; 8.

In dealing with a certified or recognized collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224 NLRB 1506 (1976). In each case, the inquiry is whether or not both parties meet their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

The information sought by the Union in this case is not presumptively relevant. When a union seeks information concerning employees outside of the bargaining unit, there is no presumption of relevance and the union has the burden to show relevance in such circumstances. *E.I. DuPont de Nemours and Co.,* 744 F.2d 536, 538 (6th Cir. 1984). The test for relevancy is whether the information assists in evaluating the merits of a grievance and the propriety of pursuing the grievance to arbitration. *United Technologies Corp.,* 274 NLRB 504, 508 (1985). If a union's information request is ambiguous or concerns nonunit employees, this does not excuse an employer's blanket refusal to comply. *Keauhou Beach Hotel,* 298 NLRB 702, 702 (1990). It is well-settled that an employer may not simply refuse to comply with an ambiguous or overly broad information request, but must instead request clarification or comply with the request to the extent it encompasses necessary and relevant information. Id.

Processing grievances is, as argued by the General Counsel and the Union, clearly a responsibility of a union, and an employer must provide information requested by the union for the purposes of handling grievances. *United-Carr Tennesse*., 202 NLRB 729 (1973). The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc*., 272 NLRB 1128 (1984). The Board uses a broad, discovery-type standard in determining relevance in information requests and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). The Board, in determining that information is producible, does not pass on the merits of a grievance underlying an information request. *W. L. Molding Co*., 272 NLRB 1239 (1984).

I find that the information sought by the Union is relevant and necessary to its performance of its duties as the exclusive collective-bargaining representative of its members. As the exclusive bargaining representative for the unit, the Union had a statutory duty to investigate its member's claim that Respondent was violating the terms of NMATA and the WPA. The Board has found that information related to subcontracting of unit work is necessary and relevant to a union's function as collective-bargaining agent. *Schrock Cabinet Co.,* 339 NLRB 182, 187 (2003). Similarly, in the instant case, the Union seeks information regarding the alleged diversion of unit work to nonunion carriers. Examining agreements Respondent had with other carriers and other local unions, lists of trips, and lists of drivers or contractors Respondent used to perform carhaul work would allow the Union to determine Respondent's compliance or noncompliance with NMATA and the WPA. Information concerning Respondent's anticipated position at arbitration that certain work was not carhaul work, a position it raised at a local hearing on the grievance, would be relevant to whether or not Respondent violated NMATA and the WPA. Thus, I find that the information sought by the Union was necessary to ascertain the nature, scope, and extent of the alleged contract violation underlying the Union's February 11 grievance and was relevant and necessary to its function as collective-bargaining agent.

After the Union demonstrated the relevancy of the requested information, the burden shifted to Respondent to establish that the information was not relevant, did not exist, or for some other valid and acceptable reason could be furnished to the requesting party. *Samaritan Medical Center,* 319 NLRB 392, 398 (1995), citing *Somerville Mills,* 308 NLRB 425 (1992) and *Postal Service,* 276 NLRB 1282 (1985). Respondents elected

not to call any witnesses at the trial. It is well-settled that the statements and arguments of counsel are not evidence. In re *Kellogg Company,* 2015 WL 5081426 (2015); see also *U.S. v. Fetlow,* 21 F.3d 243, 248 (8th Cir. 1994). Thus, Zuckerman's testimony regarding the relevance of the information sought by the Union stands unrebutted.

I find that Respondent here failed to timely respond to the Union's request for information. Respondent did not reply to the Union's February 11 request until March 13, almost a full month later. Respondents have a duty to timely respond to information requests, even if they are later able to provide a justification for not ultimately providing the requested information. *Dover Hospitality Services, Inc.,* 361 NLRB 906, 906, fn. 1 (2014), citing *Columbia University*, 298 NLRB 941, 945 (1990) (an employer must respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for non-compliance). As of the date of the hearing, 9 months after the Union's initial information request, Respondent had not yet provided the requested information. I find this delay violative of the Act.

I note that Respondent did not argue that the information sought by the Union was confidential or proprietary in its brief, however, the subject of a nondisclosure agreement was brought up numerous times during the trial. To the extent that Respondent claimed that some of the information sought was confidential or proprietary in nature, the Board has held that if an employer is concerned about confidentiality, it cannot simply raise this concern, but must instead come forward with an offer to accommodate both its concern and bargaining obligation. *Tritac Corp.,* 286 NLRB 522, 522 (1987).

The Board balances a union's need for information against any legitimate and substantial confidentiality interest established by the employer. *Earthgrains Baking Cos., Inc.,* 327 NLRB 605, 611 (1999). As part of the balancing process, the party asserting the claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville Area Assn.,* 316 NLRB 338, 340 (1995). Where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged and the employer has a duty to furnish the information. *A-Plus Roofing,* 295 NLRB 967, 970 (1989). It was thus Respondent's duty, upon asserting its confidentiality concerns, to promptly offer an accommodation. See *The Finley Hospital*, 362 NLRB No. 102, slip op. at 11–12 (2015) (employer's failure to offer an accommodation for 2 months found violative of the Act).

I find that Respondent did not satisfy its duty to come forward with an appropriate accommodation. Respondent presented no evidence at the hearing regarding the alleged confidential or proprietary nature of the information sought. However, examining the documentary evidence in this case, I find that Respondent asserted confidentiality claims in its letters of March 13, March 18, and April 10. Respondent did not provide the Union with a confidentiality agreement to sign until shortly before the hearing. I find that this belated gesture did not satisfy Respondent's duty to bargain with the Union in good faith over an appropriate accommodation.

Ultimately, Respondent has failed to elucidate a reason why it should be excused from providing the information requested by the Union on February 11 and March 3, as modified on March 26. Respondent's argument that the Union had certain of the requested information available to it through other means is without merit. The fact that a union may obtain information by other means or from another source does not alter or diminish the obligation of an employer to furnish relevant information. *Holyoke Water Power Co.,* 273 NLRB 1369, 1373 (1985). The Union admits that it had certain Article 2, Section 8 agreements in its possession that would establish that Respondent applied NMATA and the WPA to secondary traffic, rental and leased vehicles, and auction cars. (R. Exhs. 2, 3, 4, 5.) However, the Union was not aware of whether other, similar agreements existed. The Union's request was relevant and necessary both to rebut a defense Respondent might raise at arbitration, as it did at the local hearing, and to ascertain the nature and scope of Respondent's alleged violations of NMATA and the WPA. Thus, Respondent's argument that it did not need to provide further Article 2, Section 8 agreements or full-rate agreements because the Union had such agreements in its possession lacks merit.

Respondent cites *Detroit Edison Co.,* 314 NLRB 1273 (1994), for the proposition that, "information that is not on its face directly related to unit employees must be produced only if the [u]nion can make a showing of relevance to the collective bargaining process." (R. Br. at p. 11.) In *Detroit Edison Co.*, the Board overturned a judge's decision finding that an employer violated Section 8(a)(5) and (1) of the Act. The *Detroit Edison* Board noted that the Union was not in the process of processing or formulating any particular grievance at the time of the information request. 314 NLRB at 1274. Furthermore, the Board in that case noted that the union did not even suspect that the employer was in violation of any agreements negotiated between the parties. Id. However, in the instant case, the Union had already filed a grievance alleging that Respondent violated two agreements at the time of its information requests. Thus, I find this case distinguishable from *Detroit Edison Co.*

C. Respondent's Affirmative Defenses Lack Merit

Respondent raised four affirmative defenses in its answer to the complaint. It is well established that the burden of proof of proving an affirmative defense lies with the party asserting it. *Marydale Products, Co., Inc.,* 133 NLRB 1232 (1961), and *Sage Development Co.*, 301 NLRB 1173, 1189 (1991).

Respondent first alleged that the complaint failed to state a claim upon which relief could be granted. As found above, the General Counsel has established that Respondents violated Section 8(a)(5) and (1) of the Act and has, therefore, stated a claim upon which relief can be granted. Moreover, Respondent has cited no authority and presented no evidence in support of this bare assertion. As such, I find no merit to Respondent's first affirmative defense.

Second, Respondent asserted that the complaint should be dismissed and the matter deferred to the parties' grievance-arbitration policy. The Board has long held that deferral is inappropriate in Section 8(a)(5) information request cases. See e.g. *United Technologies Corp.*, 274 NLRB 504, 505 (1985);

Daimler Chrysler Corp., 331 NLRB 1324, 1324 fn. 2 (2000) enfd. 288 F.3d 434 (D.C. Cir 2002); *Chapin Hill at Red Bank*, 360 NLRB 116 fn. 2 (2014). Respondent has cited no contrary support for this affirmative defense and, as such, I find it is without merit.

Third, Respondent asserted that the Charging Party's bargaining representative, TNATINC, investigated Respondents' use of Jack Cooper Logistics for brokering used car traffic and found no violation of the parties' collective-bargaining agreement. Respondent did not produce any evidence in support of this contention. Moreover, the alleged findings of the Charging Party's bargaining representative have no relevance to this proceeding. As such, I find no merit to Respondent's third affirmative defense.

Finally, Respondent asserted that the complaint was time-barred under Section 10(b) of the Act. Section 10(b) reads in pertinent part: "Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ." 29 U.S.C. § 160(b). Pursuant to Section 10(b), a violation of the Act cannot be found, "which is inescapably grounded in events predating the limitations period." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 422 (1960). The evidence at trial established that the charge was filed on April 20, 2015. GC Exh. 1(a). The evidence further established that the information requests underlying the charge were made on February 11 and March 3, 2015, within 2 months of the filing of the charge. GC Exhs. 4; 5. As the uncontroverted evidence established that the information requests were made within 6 months of the filing of the underlying charge, I find that the charge was not time-barred under Section 10(b) of the Act.

In sum, I found no merit to any of Respondent's affirmative defenses. Moreover, I have found that the General Counsel has established that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

By failing and refusing to provide the Union with relevant information as requested in the Union's February 11, 2015, and March 3, 2015 letters, and as amended by its March 26, 2015, letter, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent is hereby ordered bargain with the Union as the exclusive collective-bargaining representative of all employees in the classification of work covered by the National Master Transporters Agreement, effective June 1, 2011, to August 31, 2015, and Supplements thereto, but excluding supervisory, managerial, guard, and confidential employees, by providing the Union with the information it requested on February 11, 2015, and March 3, 2015, and as modified on March 26, 2015, as set forth in the complaint and erratum: (1) The number of employees associated with Jack Cooper Transport that Jack Cooper Logistics, LLC has utilized since January 1, 2013, to engage in its carhaul operations; (2) A list of all trips Jack Cooper Logistics has pulled or leased or brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, and the names of the drivers or contractors who pulled those trips; (3) With respect to the request set forth in [number (2)], please provide a separate list of all trips (including the dates of those trips, along with a complete account of the vehicles being hauled) Jack Cooper Logistics has pulled or leased brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, which Jack Cooper Logistics has reason to believe is bargaining unit work under the NMATA; (4) Explain whether Jack Cooper Logistics, LLC bid on any new car traffic with any manufacturer or other entity or been awarded any spot buys for new car traffic since they have been in business whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings; (5) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)], please identify the new car traffic/manufacturer-entity/locations/dates that Jack Cooper Logistics, LLC bid whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings or any loads awarded and any spot buys; (6) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)] and Jack Cooper Logistics, LLC was awarded new car traffic from a manufacturer or other entity please (to include any spot buys for new car traffic) provide copies of the contracts with the manufacturers or any other entities who awarded the contract. Please redact any information that is confidential or proprietary; (7) Does Jack Cooper Transport Company have any Article 2 Section 8 agreements with any local union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars; (8) If the answer to [number (7)] is "yes" please provide copies of those agreements with the approvals from the National Automotive Transporters Joint Arbitration Committee; (9) Does Jack Cooper Transport haul used cars, auction cars, secondary market cars, and/or rental cars (now or in the past) not covered by an Article 2 Section 8 Agreement; (10) If the answer to [number (9)] is "yes" please identify the traffic in question; (11) Please provide a list of all trips leased by Jack Cooper Logistics, LLC out of the Manheim, New Jersey terminal, the name of the company to which the load was leased and a list of the vehicles transported; (12) Any documentation, memorandum or evidence supporting Jack Cooper's position that "used car traffic is not considered carhaul work" and; (13) Any audit finding from the International Brotherhood of Teamsters concerning Jack Cooper Logistics or one of its subsidiaries.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Jack Cooper Holdings, Kansas City, Missouri and Jack Cooper Transport Co., Louisville, Kentucky, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, General Drivers, Warehousemen & Helpers Local Union No. 89, by failing and refusing to furnish it with requested information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the classification of work covered by the National Master Transporters Agreement, effective June 1, 2011, to August 31, 2015, and supplements thereto, but excluding supervisory, managerial, guard, and confidential employees.

(b) In any like or related manner interfering with, restraining, or coercing employees of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the following information it requested in its February 11, 2015, and March 3, 2015 letters, and as modified in its March 26, 2015 letter: (1) The number of employees associated with Jack Cooper Transport that Jack Cooper Logistics, LLC has utilized since January 1, 2013, to engage in its carhaul operations; (2) A list of all trips Jack Cooper Logistics has pulled or leased or brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, and the names of the drivers or contractors who pulled those trips; (3) With respect to the request set forth in [number (2)], please provide a separate list of all trips (including the dates of those trips, along with a complete account of the vehicles being hauled) Jack Cooper Logistics has pulled or leased brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, which Jack Cooper Logistics has reason to believe is bargaining unit work under the NMATA; (4) Explain whether Jack Cooper Logistics, LLC bid on any new car traffic with any manufacturer or other entity or been awarded any spot buys for new car traffic since they have been in business whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings; (5) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)], please identify the new car traffic/manufacturer-entity/locations/dates that Jack Cooper Logistics, LLC bid whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings or any loads awarded and any spot buys; (6) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)] and Jack Cooper Logistics, LLC was awarded new car traffic from a manufacturer or other entity please (to include any spot buys for new car traffic) provide copies of the contracts with the manufacturers or any other entities who awarded the contract. Please redact any information that is confidential or proprietary; (7) Does Jack Cooper Transport Company have any Article 2 Section 8 agreements with any local union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars; (8) If the answer to [number (7)] is "yes" please provide copies of those agreements with the approvals from the National Automotive Transporters Joint Arbitration Committee; (9) Does Jack Cooper Transport haul used cars, auction cars, secondary market cars, and/or rental cars (now or in the past) not covered by an Article 2 Section 8 Agreement; (10) If the answer to [number (9)] is "yes" please identify the traffic in question; (11) Please provide a list of all trips leased by Jack Cooper Logistics, LLC out of the Manheim, New Jersey terminal, the name of the company to which the load was leased and a list of the vehicles transported; (12) Any documentation, memorandum or evidence supporting Jack Cooper's position that "used car traffic is not considered carhaul work" and; (13) Any audit finding from the International Brotherhood of Teamsters concerning Jack Cooper Logistics or one of its subsidiaries.

(b) Within 14 days after service by the Region, post at its facilities in Kansas City, Missouri, and Louisville, Kentucky, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 27, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with General Drivers, Warehousemen & Helpers Local Union No. 89, as the exclusive collective bargaining representative of employees in the Kansas City, Missouri, and Louisville, Kentucky, bargaining units, by refusing to furnish the Union with requested information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish the Union with the information it requested on February 11, 2015, and March 3, 2015, as modified on March 26, 2015.

JACK COOPER HOLDINGS D/B/A JACK COOPER TRANSPORT CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-150482 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.